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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF VERMONT,
PETITIONER

v.

DAVID BRUNELL,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VERMONT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a murder suspect in custody when police tell him he's not under arrest, but that he "had to" leave his family that night at 10:00 PM to go with police to a station a half hour drive away and give a required statement?

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STATEMENT OF THE CASE

Abby Brunell, the infant daughter of David and Ann Brunell, died on May 31, 1986 in Waterbury, Vermont. Ann had gone out leaving Abby alone with David. On her return she met David holding the lifeless body of Abby who was rushed to the hospital by ambulance. A June 1 autopsy led to the medical examiner's opinion that Abby's death was a homicide by child abuse. The patterns of injury suggested that the mechanisms of injury and death included shaking and manual asphyxiation. See Exhibit A. The medical examiner called State Police Sgt. DiVincenzi with this information, who in turn called Waterbury Police Chief Wayne Sourdiff to coordinate an investigation. Sourdiff knew that Abby was in the custody of her parents at the time of her death. He also knew that Abby had been the prior victim of child abuse and had been taken from parental custody for protection sometime in the past.

DiVincenzi and Sourdiff met with the State's Attorney. A plan evolved to attempt an interview with the Brunells without giving Miranda[1] rights. The police learned David and Ann were in Groton, Vermont (approximately 45 miles from Waterbury) at the home of David's parents. So the police went to Groton in an effort to get statements.

They arrived at the elder Brunell's house at approximately 10:00 PM where several of Defendant's siblings and their spouses were present, having gathered there after learning of Abby's death.

DiVincenzi and Sourdiff walked into the family gathering. After extending condolences, DiVincenzi told David and Ann they were investigating Abby's death. David was face to face with DiVincenzi who told him he "needed to get some information". (Tr. p. 12).[2] He said he was required to make

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[1] Miranda v. Arizona, 384 U.S. 436 (1966)

[2] Transcript references are to the transcript of the suppression hearing.

a report about Abby's death and wanted a statement from David. Tr. p. 50.

DiVincenzi told David he was not under arrest, and asked him to come to the police station to give a statement. A discussion took place as to which police station they would go to--Middlesex (the station covering Waterbury) or St. Johnsbury--which was closer. David asked if he would be coming back. DiVincenzi then promised he would bring him back to his parents' house that night without arresting him.

At this point Sourdiff became involved. He told David and Ann he "needed to get their statements because it was required by his investigation". (Tr. p. 31). They were told by Sourdiff "I have to have some sort of statement from them in order to make up my report". Mrs. Lincoln Brunell became involved. She testified (Tr. p. 97-98) that David's state of mind was confused. "It was like he was lost". Then the following occurred:

> Q. (by Mr. Cheney) When the police came into your house, do you recall any conversation? Do you remember what they said to David?
>
> A. Well, I don't know which one it was, but they asked him if--they told him they wanted him to go to St. Johnsbury for questioning, and I asked them if they had to go tonight because they was pretty upset at losing his daughter; and he said, "yes, he had to go tonight", that he couldn't put it off, or something like that...
>
> Q. Did you raise any objection at this time?
>
> A. I just asked them if they had to go cause they were pretty upset at losing his daughter and I asked, "do they have to go?" "Couldn't it wait?" and they said, "no, they had to go tonight".
>
> Q. It was clear to you that they had to go that night?
>
> A. Yes.
>
> Q. Did they give a reason?
>
> A. They just said for questioning.

Sgt. DiVincenzi, who was in charge of the investigation, claimed not to remember the conversation, but did not deny it occurred. Tr. p. 51). Sourdiff remembered it saying "that's possible that she said something like that". (Tr. p. 83).At

that point David and Ann "agreed" to go to the St. Johnsbury State Police Barracks to give the requested statements.

David and Ann went on the half hour trip to the police station in a police vehicle (which was their only way home). David was separated from Ann and interrogated from about 10:30 PM to 12:15 AM, without initially being given his Miranda rights. Eventually he gave a confession that he had shaken and suffocated Abby. He was alone with police the entire time. Eventually the police did take Ann and David home.

On cross-examination DiVincenzi summed up the entire sequence of events, from the initial meeting in Groton until he returned the Brunells there, admitting:

> "It is a fair inference that this individual (David) believed that if he answered questions and confessed, that he would not be arrested and he would be taken home". Tr. p. 68.

After the suppression hearing, the trial court held that a reasonable person in David's position would not believe that he was free to refuse to go to the barracks and answer police questioning that evening. The Court suppressed the confession, a decision upheld by the Vermont Supreme Court.

I. REASONS WHY THE WRIT SHOULD BE DENIED

The Vermont trial court and Supreme Court, applied the correct standard in evaluating whether Brunell was in custody for Miranda purposes. That standard was announced in State v. Willis, 145 Vt. 459, 475; 494 A.2d 108, 117 (1985) following Berkemer v. McCarty, 468 U.S. 420, 442 (1984):

> "In determining when a suspect 'has been taken into custody, or otherwise deprived of his freedom of action in any significant way', our courts should make an objective inquiry into the totality of the circumstances to determine if a reasonable person would believe he or she were free to leave or refuse to answer police questioning."

The Vermont Supreme Court analyzed this case, as it did Willis, in the light of this Court's decisions in Oregon v. Mathiason, 429 U.S. 492 (1977) and California v. Beheler, 463 U.S. 1121 (1983). In both those cases, this Court enunciated the Miranda custody test, as whether the suspect is under arrest or its functional equivalent. That is the test that the Vermont Supreme Court applied.

The "custody" or "functional equivalent of arrest" test developed in Mathiason and Beheler for Fifth Amendment purposes and applied by the Vermont courts is not a bright line test. Necessarily courts must sift through a rich diversity of fact patterns to weigh the totality of circumstances on a case by case basis to determine what an objective person would conclude. This much is recognized by Justice Peck, dissenting, by his reference to Michigan v. Chesternut, U.S. 108 S.Ct. 1975 (1988). Accordingly, administering this aspect of Miranda must be left to the careful scrutiny of judges who apply the correct legal standards, and some leeway must be given them in exercising this responsibility.

The totality of circumstances here support the Vermont court's determination that a reasonable person in David Brunell's position would believe he had been arrested, or the functional equivalent of it:

1) DiVincenzi told him he "needed" to give a required statement, although he didn't have to come with him, and wasn't under arrest;

2) Later Sourdiff told David's mother, David "had to go" that night to give a statement, apparently confusing David and contradicting DiVincenzi (so characterized by Chief Justice Allen). (Petition pg. 8a);

3) David and Ann were taken from an isolated rural area in a police cruiser for a half hour ride and so had no independent means to leave;

4) There is a negative implication in DiVincenzi's statements, as he admitted on cross, that if David didn't come and give the statement he would be arrested;

5) David was taken late at night to a police station and isolated from family and friends to be interrogated;

6) A person in David's position would believe he was under arrest. Since he was alone with Abby at the time of her death, he was aware that the investigation had focused on him and he was subject to arrest. David

stated in his confession that he was scared when the police showed up at the house because he thought he had been caught. Pet. p. 58a. C.f. United States v. Bengivenga, 845 F.2d 593, N.16 (5th Cir. 1988).

The State's brief in support of the Petition insists that the Vermont Supreme Court's decision is erroneous because it turns "on one officer's answer to a question from respondent's mother that he had to go to the police barracks". (Pet. p. 6). Of course, a reading of Chief Justice Allen's opinion demonstrates his judgment rests on far more than that. In addition to the facts previously recited, the Vermont courts undoubtedly realized the incommunicado interrogation in the police station is precisely the arena in which Miranda is designed to function. In contrast, the atmosphere in a motor vehicle stop "is substantially less police dominated than that surrounding the kinds of interrogation at issue in Miranda itself." Berkemer v. McCarty, 488 U.S. 420 (1984).

What the Assistant Attorney General really complains of is that the Vermont courts did not accept her contention that the "had to go" statement was an insignificant inducement on the Defendant. Surely, however, Chief Justice Allen is correct in stating that all the police "activity described far exceeds the relatively innocuous requests and conduct described in Mathiason and Beheler". (Pet. p. 8a)

This Court requires a neutral judge insist that the state meet a "heavy burden" to demonstrate that the Defendant knowingly and intelligently waived his Fifth Amendment privilege. Miranda, 384 U.S. 475. It is consistent with that duty to conclude that telling a suspect he "had to go" is coercive, and vitiates the purported voluntariness of the trip to the police station and the subsequent confession. The Vermont judges fulfilled their legal obligation by concluding that David's removal to the police station and the subsequent lengthy incommunicado interrogation, were the functional equivalent of

custody, notwithstanding the police ruse of a promise of nonimmediate arrest in exchange for a confession.

The State asserts there is confusion and lack of uniformity among the federal circuits, and the state courts concerning the proper test for custody for Miranda purposes. Even if true, that situation should not affect this case.

Simply put, Mathiason and Beheler clearly delineate the standard to apply to Fifth Amendment confession issues when Miranda is implicated. The Vermont courts applied that standard. If Miranda is to be administered with any efficiency, decisions which reasonably apply the correct legal test to a relevant fact pattern should not be disturbed. The Vermont courts committed no error.

For the foregoing reasons, the writ should be denied.

Dated: Dec 30, 1988

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CERTIFICATE OF SERVICE

On this day of December, 1988, I mailed the above-entitled Respondent's Brief in Opposition to Susan R. Harritt of the Vermont Attorney General's Office, Pavilion Office Building, Montpelier, Vermont.

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